Petition

No.

81-612

In The

Supreme Court of the United States

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CLERK

October Term, 1981

SHEILA MASINO and GERALD MASINO,

Petitioners,

vs.

OUTBOARD MARINE CORPORATION and OMC LINCOLN,

Respondents,

JOANNE BUBELLO, Administratrix of the Estate of ALAN J. BUBELLO, Deceased,

Petitioner,

vs.

PAULADA TAYLOR and CHARLES E. TAYLOR and ELWYN SMITH, Sr., d/b/a SMITH'S AUTO SERVICE and ELWYN SMITH, Jr., d/b/a SMITH'S AUTO SERVICE,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in a civil jury case in a United States District Court where the jurisdiction of that court is based upon the diversity of citizenship of the parties, the District Court must follow law of the forum state which provides that judgment may be entered upon a jury verdict which is less than unanimous?

STATEMENT PURSUANT TO RULE 21(1)(b) LISTING NAMES OF PARTIES BELOW

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No.

In The

Supreme Court of the United States

October Term, 1981

SHEILA MASINO and GERALD MASINO,

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vs.

OUTBOARD MARINE CORPORATION and OMC LINCOLN,

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Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The above-named petitioners respectfully pray that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Third Circuit entered in *Bubello v. Taylor, et al.* on June 11, 1981 and entered in *Masino v. Outboard Marine Corporation, et al.* on June 23, 1981, both opinions affirming the refusal of the District Court, in civil diversity cases, to instruct, according to Pennsylvania statutory law, that a jury vote of five-sixths would be sufficient for entry of judgment.

OPINIONS BELOW

In *Bubello v. Standard Auto Parts, et al.*, the Court of Appeals for the Third Circuit entered a judgment order without opinion on June 11, 1981 (*see* appendix *infra*, 9a). In *Masino v. Outboard Marine Corporation, et al.*, the United States Court of Appeals for the Third Circuit entered its opinion on June 23, 1981 (1a). The opinion was not reported as of this time.

JURISDICTION

The orders of the United States Court of Appeals for the Third Circuit were entered on June 11, 1981 and June 23, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Both cases are sought to be reviewed on certiorari to the same court and both involve identical questions. Accordingly, a single petition for writ of certiorari covering both cases is filed pursuant tc Rule 19.4 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Both of the present cases were personal injury actions instituted in the United States District Court for the Eastern

District of Pennsylvania. Jurisdiction of the District Court in both cases was founded upon diversity of citizenship between the parties.

At the conclusion of the taking of evidence and before the charge of the jury in both cases, counsel for petitioners requested that the trial court instruct the jury that they might enter a decision in the case based upon a less than unanimous verdict. This request of counsel was based upon the current practice in the courts of the forum state, Pennsylvania, under a recent statutory enactment which is codified at Title 42 Pa. C.S.A. §5104 (Purdon's 1980).

In both cases, the District Court denied the request of counsel for petitioners and charged the jury that a unanimous verdict was required. In *Masino*, an eight-person jury rendered a unanimous verdict in favor of respondents on May 15, 1980. Petitioners filed a post-verdict motion requesting that a new trial be granted because of the failure of the District Court to instruct the jury that a non-unanimous verdict, pursuant to Pennsylvania law, was permitted. This motion was denied on October 10, 1980. An appeal to the United States Court of Appeals for the Third Circuit followed, in which, *inter alia*, the failure to give the non-unanimous verdict instruction was assigned as error. The United States Court of Appeals for the Third Circuit affirmed the District Court. In *Bubello*, a jury of eight persons rendered a unanimous verdict in favor of respondents on April 15, 1980. Petitioners similarly filed a post-verdict motion requesting that a new trial be granted on the same grounds as in *Masino*. This motion was denied on October 8, 1980. An appeal to the Third Circuit Court of Appeals followed, assigning as error, *inter alia*, the refusal of the District Court to charge the jury that they could return a less than unanimous verdict. The Court of Appeals in *Bubello* also affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

Both these cases present an important question, which this Court has yet to address, concerning the proper nature and incidents of the federal district court jury in a civil diversity case. Thirty-one states now permit less than unanimous jury verdicts in civil actions. *See* Note, "The Erie Doctrine and Non-unanimous Civil Jury Verdicts", Volume 4, *American Journal of Trial Advocacy*, Spring 1981, No. 3, page 665, footnote 2. In 1978, the legislature of the forum state in both of these actions, the Commonwealth of Pennsylvania, amended Pennsylvania statutory law which incorporates and recognizes the right to trial by jury embodied in Article I, §6 of the Pennsylvania Constitution by adding the following:

> "Civil Verdicts. In any civil case a verdict rendered by at least five-sixths of the jury shall be the verdict of the jury and shall have the same effect as a unanimous verdict of the jury."

42 Pa. C.S.A. §5104(b). Petitioners submit that, under the line of decisions in which this Court has interpreted its own holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal district courts sitting in diversity actions in the Commonwealth of Pennsylvania must apply the forum state's non-unanimous civil jury verdict rule. The fundamental rights of the petitioners in these actions, as in all actions based solely on diversity of citizenship, are created by the forum state. Federal district courts are, therefore, unable to "substantially affect the enforcement of the right as given by the State," within the meaning of this Court's decision in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). To require of either litigant that it convince every member of the jury rather than five-sixths of them, it is submitted, substantially affects the enforcement of rights created by the Commonwealth of Pennsylvania.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court again examined the doctrine first enunciated in *Erie Railroad v. Tompkins, supra*, as explained in the later case of *Guaranty Trust Co. v. York, supra*. This Court there found that two policies underlay the *Erie* rule: "discouragement of forum shopping and avoidance of inequitable administration of the laws," 380 U.S. at 468. It is obvious that the requirement of a unanimous jury verdict in diversity cases would encourage a litigant to choose the federal over the state forum if the party felt it was to his or her advantage that the verdict of the jury be required to be unanimous. It is also an inequitable administration of the law to require either litigant in a diversity case to convince each and every member of the jury where in the state court he or she would only have to convince a majority of the jury. Such a requirement leads to the inevitable result that the outcome of a diversity case will turn on whether it is tried in state or federal court. Such a result is plainly forbidden by this Court's decisions interpreting *Erie Railroad Co. v. Tompkins*.

The fundamental inequity of requiring unanimous jury verdicts in a federal court diversity suit where the law of the forum state permits less, appears most clearly where a plaintiff commences an action in state court against an out-of-state defendant, who then removes. Here, plaintiff has had the right to a less-than-unanimous jury verdict taken away, and the requirement of jury unanimity substituted, by defendant's removal to federal court, over which plaintiff has no control. Petitioners submit that this result is that type of "unequitable administration of the laws," as well as forum shopping, which the post-*Erie* decisions of this Court clearly forbid.

The question then becomes whether any requirements of the United States Constitution or of federal law prohibit the district courts from adopting forum state laws permitting non-unanimous civil jury verdicts. Petitioners believe that this

question should be answered in the negative. Beginning in 1970, this Court in a series of cases has examined and defined the constitutional essentials of the right to trial by jury. This process of examination began with *Williams v. Florida*, 399 U.S. 78 (1970), wherein this Court held that the Sixth and Fourteenth Amendments to the United States Constitution did not require that states provide a defendant in a state criminal trial with a 12-person jury and that a 6-member jury in such circumstances was constitutionally permissible. In a later term, this Court further held that non-unanimous jury verdicts in state court criminal proceedings were neither violative of due process of law, *Johnson v. Louisiana*, 406 U.S. 356 (1972), nor of the Sixth Amendment right to trial by jury or the equal protection clause of the Fourteenth Amendment, *Apodaca v. Oregon*, 406 U.S. 404 (1972). In *Colgrove v. Battin*, 413 U.S. 149 (1973), the United States District Court had adopted a local rule permitting the same number of jurors in civil diversity cases, six, as in the forum state, Montana. This Court upheld the validity of the local rule, saying that "it cannot be said that 12-member juries is a substantive aspect of the right of trial by jury."

In the foregoing line of cases, this Court has declined to view the jury as a museum piece, captured at a particular moment in time and forever unchanging. Rather, the Court has viewed the right to trial by jury as a functional and dynamic process, the essential constitutional requirements of which may from time to time be re-examined in light of the fundamental purpose of the jury. Given that this Court has already held that there is no requirement that federal juries consist of 12 persons, or that verdicts in state criminal trials be unanimous in order to satisfy the requirements of the United States Constitution, it is a logical next step to grant the present petitions for writ of certiorari and to hold, as petitioners advocate, that there is no constitutional or other federal requirement that jury verdicts in federal civil diversity cases be unanimous.

Apart from the United States Constitution, there is also no other compelling federal interest in a requirement of the unanimous jury verdict in civil diversity cases in the federal district courts. It is true that Rule 48 of the Federal Rules of Civil Procedure states that "[t]he parties may stipulate that the jury shall consist of any number less than 12 or that a verdict of a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury." However, this Court held in *Colgrove v. Battin, supra,* with reference to that part of F.R.C.P. 48 which concerns the number of jurors, that the rule did not imply a requirement of 12 jurors in the absence of a stipulation by the parties to a lesser number. The Court's reasoning would be equally applicable to that portion of Rule 48 which concerns itself with the number of jurors required to reach agreement. In both the *Colgrove* case and in *Walker v. Armco Steel,* ____ U.S. ____, 100 Sup. Ct. 1978 (1980), this Court has applied state law even though one of the Federal Rules of Civil Procedure colorably applied to the situation.

Petitioners recognize that in recent terms of this Court, some limitations have been placed on the line of cases interpreting the federal right to a trial by jury from *Williams v. Florida* through *Apodaca v. Oregon.* In *Ballew v. Georgia,* 435 U.S. 223 (1978) this Court, although adhering to and reaffirming its decision in *Williams,* held that a 5-person jury did not satisfy constitutional requirements, and in *Burch v. Louisiana,* ____ U.S. ____, 99 Sup. Ct. 1623 (1979), this Court held that in a state criminal trial for a non-petty offense, if the jury consisted of 6 members, conviction by any number less than all of them deprived the defendant of his or her constitutional right to a trial by jury. In the Commonwealth of Pennsylvania, state court civil juries now consist of 8 members. While the first pronouncement of this Court on the issue of jury unanimity in federal civil diversity trials might be more easily rendered in the context of a 12-person jury in the forum state, the Court can and should

speak to the issue in the context of the present petitions. The petitions arise in a civil and not a criminal context, and the number of jurors is one-third larger than the number which this Court considered in the *Ballew* and *Burch* cases.

In its opinion in the *Masino* case, the Third Circuit made the following statement at page 5a of its Slip Opinion, *infra*,

> "the concern with forum shopping in this case is minimal because the appellants brought suit in federal court even though they had notice that the Federal verdict requirement would very likely differ from the one they advocated. This action therefore demonstrates that the rule chosen is not so determinative as to dictate choice of forum."

This reasoning is plainly erroneous. Petitioners may have other grounds for initiating a diversity action in federal court, such as, *inter alia*, the relative state of the civil dockets in state and federal courts and the relative rapidity with which a case might be reached for trial in either forum. Petitioners submit that the fact is that a federal rule for civil jury unanimity in diversity cases which differs from that of the forum state will indeed encourage forum shopping.

CONCLUSION

This Court has acknowledged that the burden on the lower federal courts, and particularly the United States District Courts, continues to grow at a rapid pace. This growth is particularly acute on the civil side, and is never substantially remedied by the infrequent increases in the allotted numbers of the United States district judges. With three-fifths of the states now permitting civil jury verdicts on a less than unanimous basis, as noted at the beginning of this petition, this Court could make a substantial stride towards reducing the ever growing burden on the federal courts by deciding the issue of jury unanimity in federal diversity cases which arises in the present petitions. Furthermore, this Court having spoken on both jury size and jury unanimity in the criminal context and on the size of the federal jury in the civil diversity trials is the logical next step in the pronouncements of this Court on the federal right to a trial by jury, and the time is now right for the Court to take that step.

For the foregoing reasons, the present petition for writs of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

MICHAEL D. SHAPIRO
Attorney for Petitioners

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2711

MASINO, SHEILA and MASINO, GERALD,
Appellants

v.

OUTBOARD MARINE CORPORATION and
OMC-LINCOLN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 79-02465)

Submitted Under Third Circuit Rule 12(6)
June 12, 1981

Before: ALDISERT, WEIS, and SLOVITER, *Circuit Judges*.

(Filed June 23, 1981)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The question presented by this appeal from a unanimous jury verdict for the defendant in a diversity of citizenship case is whether the district court sitting in the Eastern District of Pennsylvania erred in refusing to apply a Pennsylvania statute providing that a civil jury vote of five-sixths suffices for entry of judgment. The district court reasoned, *inter alia*, that the long-standing federal policy favoring unanimous civil jury verdicts compelled application of the unanimity rule in this case. *Masino v. Outboard Marine Corp.*, 88 F.R.D. 251 (E.D.Pa. 1980). We agree and accordingly affirm.

Gerald and Sheila Masino, appellants, initiated this diversity action alleging that appellee had manufactured and sold a defective lawnmower that had injured Mrs. Masino. The case was tried to a jury of eight persons pursuant to the local rules of the Eastern District of Pennsylvania,[1] and counsel for appellants requested a charge based on Pa. Cons. Stat. Ann. tit. 42, §5104(b) (Purdon Supp. 1980): "In any civil case a verdict rendered by at least five-sixths of the jury shall be the verdict of the jury and shall have the same effect as a unanimous verdict of the jury." The trial judge refused the instruction, and the jury returned a unanimous verdict for appellee.

Although federal courts sitting in diversity actions must usually apply the substantive law of the forum state, the same principle does not apply with equal force to procedural rules. The line of demarcation between "substantive" rules and "procedural" rules, however, is often blurred, and the Supreme Court has cautioned that the line "shifts as the legal context changes."

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1. E.D.Pa.R. 29½, *now found* in E.D.Pa.R. 34(b)(1). Application of the five-sixths rule would therefore require agreement of seven jurors. Appellants do not challenge the number of jurors used.

Hanna v. Plumer, 380 U.S. 460, 471 (1965). One test for determining whether a federal or state rule should be applied is the "outcome determinative" test, but the Supreme Court has warned against its mechanical application. *Byrd v. Blue Ridge Electric Cooperative, Inc.*, 356 U.S. 525, 537-38 (1958); *see also* Hanna, 380 U.S. at 467. Recognizing the complexity of the inquiry, this court has eschewed reliance on "litmus paper" tests, and has instead examined the choice of law question in light of the policies underlying the doctrine developed from *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *See, e.g., Edelson v. Soricelli*, 610 F.2d 131, 141 (3d Cir. 1979); *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160, 163 (3d Cir. 1976).

In *Edelson v. Soricelli* and *Stoner v. Presbyterian University Hospital*, 609 F.2d 109 (3d Cir. 1979), we held that Pennsylvania's requirement that medical malpractice claims be arbitrated before judicial resolution binds federal courts in diversity actions. We characterized the arbitration requirement as "a condition precedent to entry into the state judicial system," *Edelson*, 610 F.2d at 134, and we recognized the advantage that would have resulted to federal plaintiffs if federal courts did not enforce the precondition, *id.* at 141. We noted that the arbitration requirement did not affect the trial of the federal action once the case ripened for trial, but merely regulated the time at which trial could occur. *See generally Edelson*, 610 F.2d at 134-35, 141.

In contrast, the five-sixths majority verdict statute does affect the way the trial is conducted, and in this fundamental respect this case differs from *Edelson* and *Stoner*. We therefore believe the proper analysis of this question may be derived from *Byrd v. Blue Ridge Electric Cooperative, Inc.* In *Byrd*, the Court held that the determination of employee status for purposes of South Carolina's Workmen's Compensation Act must be submitted to the jury in a federal diversity action even though South Carolina courts would leave that issue to

the trial judge. *Edelson* isolated three premises underlying the *Byrd* decision: the lack of a strong and explicit state policy justifying the removal of this discrete factual determination from the jury; the federal interest in insuring access by litigants in federal courts to a jury; and the continuing viability of the outcome determinative analysis of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). *See Edelson*, 610 F.2d at 138-40. Although *Edelson* concluded that these three premises would be served better by applying the state requirement of arbitration of medical malpractice claims as a precondition to suit in federal court, we conclude that the federal requirement of jury unanimity is the appropriate rule in the present case.[2]

The single apparent state interest in application of a five-sixths majority rule is greater efficiency of judicial administration by reducing the number of deadlocked juries. Pennsylvania has no concern, however, with the administration of the federal judicial system. Indeed, we noted in *Edelson* that *Byrd* "implicates no more than trial management in federal courts. . . ." 610 F.2d at 141. Because trial management in the federal courts is a weighty concern of the federal judiciary and of no concern to the state judiciary, the absence of a state interest in application of the five-sixths majority rule fulfills the first premise of *Byrd*.

The federal interest in unanimity, although not rising to constitutional dimensions, is cloaked in a strong tradition, *see Johnson v. Louisiana*, 406 U.S. 356, 370 (1972) (Powell, J., concurring) ("unanimity . . . is mandated by history"), and this interest meets the second premise of *Byrd*. Assuming, and this would be a most

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2. The federal unanimity requirement is implicit in Fed.R. Civ.P. 48: "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

generous assumption, that the tradition favoring unanimous verdicts could be reversed by a contrary local rule, just as the tradition favoring twelve jurors may be altered, *see Colgrove v. Battin*, 413 U.S. 149, 160, 163 (1973), no local rule to that effect exists in the Eastern District of Pennsylvania. The federal interest need not be of constitutional magnitude to outweigh an insubstantial state interest, however, if all other aspects of *Byrd* are met. *See Byrd*, 356 U.S. at 357 & n.10; Edelson, 610 F.2d at 139.

Finally, we are not convinced that application of the federal unanimity rule instead of the state five-sixths majority rule will alter a substantial number of outcomes and thereby frustrate the policy of discouraging forum shopping underlying *Erie* and its progeny. *See Witherow*, 530 F.2d at 164. The concern with forum shopping in this case is minimal because the appellants brought suit in federal court even though they had notice that the federal verdict requirement would very likely differ from the one they advocated. This action therefore demonstrates that the rule chosen is not so determinative as to dictate choice of forum. The concern with preventing discrimination against residents, another policy underlying *Erie*, is also minimal; it is improbable that a party who has lost a verdict unanimously would have prevailed had he been required to persuade only seven, rather than eight, jurors to vote the other way. The predominant effect of a majority verdict rule in comparison to a unanimous verdict rule is to reduce the likelihood of deadlocked juries. *See Wieser v. Chrysler Motors Corp.*, 69 F.R.D. 97, 100-01 (E.D.N.Y. 1975) (examining New York's experience with majority verdicts). As a result, the concern with state-federal relationships in this case is minimal because the state simply has no interest in managing trials conducted in federal courts. Thus, the final premise of *Byrd* is not offended by our decision.

The trial judge employed alternative holdings, concluding that the use of the unanimity rule was not error, and in the alternative, if it was error, it was harmless, *see* Fed. R. Civ. P. 61, but we need not reach this question. We rest our conclusion solely on the ground that use of the unanimity rule was not error.

Accordingly, the order of the district court entering judgment for appellee will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2711

MASINO, SHEILA and MASINO, GERALD,

Appellants

vs.

OUTBOARD MARINE CORPORATION and OMC-LINCOLN

(D.C. Civil No. 79-02465)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, WEIS and SLOVITER, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) June 12, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 29, 1980, be, and the same is hereby affirmed. Costs taxed against appellants.

Judgment

ATTEST:

s/ Sally Mrvos
Clerk

June 23, 1981

Certified as a true copy and issued in lieu
of a formal mandate on July 15, 1981.

Test: s/ Frances R. Matysik

Deputy Clerk, United States
Court of Appeals
for the Third Circuit

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2656

BUBELLO, Joanne, Administratrix of the Estate of ALAN J. BUBELLO, Deceased,

Appellant

vs.

TAYLOR, Paulada and TAYLOR, Charles E. and SMITH, Elwin Sr. D/B/A SMITH'S AUTO SERVICE, SMITH, Elwin Jr. D/B/A SMITH'S AUTO SERVICE

vs.

STANDARD AUTO PARTS,

Third Party deft.

vs.

AUTOMOTIVE DEVICES OF PENNSYLVANIA

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 77-00500)

Submitted Under Third Circuit Rule 12(6)
June 11, 1981

Judgment Order

Before: ALDISERT, WEIS, and SLOVITER, *Circuit Judges.*

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk
DATED: June 11, 1981

Opposition

1

No. 81-612

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Respondents.

BRIEF FOR RESPONDENTS OUTBOARD MARINE CORPORATION AND OMC-LINCOLN TO PETITION FOR WRIT OF CERTIORARI OF PETITIONERS SHEILA MASINO AND GERALD MASINO

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QUESTION PRESENTED

In a civil jury case in a United States district court, where jurisdiction is based on diversity of citizenship, must the court follow the law of the forum state which provides that a jury verdict which is less than unanimous is a valid verdict of the jury?

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PAULADA TAYLOR and CHARLES E. TAYLOR and ELWYN SMITH, Sr., d/b/a SMITH'S AUTO SERVICE and ELWYN SMITH, Jr., d/b/a SMITH'S AUTO SERVICE,

Respondents.

BRIEF FOR RESPONDENTS OUTBOARD MARINE CORPORATION AND OMC-LINCOLN TO PETITION FOR WRIT OF CERTIORARI OF PETITIONERS SHEILA MASINO AND GERALD MASINO

OPINIONS BELOW

In *Masino v. Outboard Marine Corporation, et al,* No. 79-2465, the United States District Court for the Eastern District of Pennsylvania filed its memorandum of decision on October 28, 1980.

In *Masino v. Outboard Marine Corporation, et al,* No. 80-2711, the United States Court of Appeals for the Third Circuit filed its opinion on June 23, 1981.

STATEMENT OF THE CASE

On August 19, 1977, the petitioner Sheila Masino, was operating a Lawn-Boy lawn mower when she reached into the chute, from which the cut grass was discharged, and came in contact with the mower's moving blade. As a result the petitioner suffered various injuries to her hand. The petitioners instituted suit in the United States District Court for the Eastern District of Pennsylvania against the manufacturer of the lawn mower, alleging that the respondent was liable for the said injuries under theories of negligence and strict liability in tort. The court's jurisdiction was invoked by way of diversity of citizenship between the parties.

At the conclusion of the taking of evidence, and before the jury charge, counsel for the petitioners requested that the trial judge instruct the jury that a verdict may be rendered on the basis of a majority verdict rather than a unanimous verdict. Petitioners' request was based upon the argument that the Pennsylvania five-sixths majority verdict, as codified in 42 Pa. C.S.A. §5104, is substantive law, and therefore, the district court was bound to apply it in a diversity proceeding. The trial judge denied the petitioners' request and charged the jury that a unanimous verdict was required.

On May 15, 1980, the jury of eight persons rendered a *unanimous* verdict in favor of the respondents, Outboard Marine Corporation and OMC-Lincoln.* Thereafter, the petitioners filed a post verdict motion requesting a new trial on the sole ground that the failure to instruct the jury according to the five-sixths majority verdict rule was error. The motion was denied on October 10, 1980, and on October 27, 1980, the trial judge rendered an opinion in support of his decision. Finally, the petitioners filed an appeal with the United States Court of Appeals for the Third Circuit, presenting the sole question for decision. The Third Circuit, per Judges Aldisert, Weiss and Sloviter, rendered its opinion on June 23, 1981 affirming the judgment of the district court, entered in favor of the respondents.

ARGUMENT

It is the contention of the respondents that the facts of the case at bar do not warrant this Honorable Court's granting of the petitioners' writs, as there are no special and important reasons to do so. In the instant action the jury of eight found in favor of the respondents by way of a unanimous verdict. It is inconceivable that the lower court permitted prejudicial error, pursuant to F.R.C.P. 61, in its charge to the jury of the unanimous verdict requirement. Even if the Pennsylvania majority verdict had been utilized the petitioners offer no explanation as to how the outcome would have differed. Had the petitioners desired to utilize the majority verdict rule it could have been stipulated to by the parties during the course of the trial. F.R.C.P. 48. However, no request for such a stipulation was made by the petitioners. Consequently, while the

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* Pursuant to 28.1 of the Rules of the Supreme Court of the United States OMC-Australia Pty. is a subsidiary of the respondent Outboard Marine Corporation.

particular issue advanced by the petitioners may be a question to be decided by the Court in the future, it is not ripe for decision based upon the posture of the case at bar.

Furthermore, there is no compelling reason to grant the petitioners' writ as both the district court and circuit court have made an extensive analysis of this question by way of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1968), and its progeny. *Erie* established the general proposition that there is no federal common law, and therefore, Congress did not have the power to declare substantive rules of common law applicable to a state. The practical use of this general formulation was left to subsequent decisions. The case of *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945), held that the outcome of the litigation in the federal court should be substantially the same, insofar as legal rules determine the outcome, as it would be in the state court. Further, a federal court must adhere to state law, whether statutory or decisional, if it deals with a substantive right created by the state.

In *Byrd v. Blue Ridge Electric Cooperative, Inc.,* 356 U.S. 525 (1958) this Court elaborated on the outcome determinative analysis of *Guaranty Trust Co.,* by considering the strength and explicitness of the state policy and the federal interest in insuring the proper and orderly functioning of its court system. Finally, this Court stated in *Hanna v. Plumer,* 380 U.S. 480 (1965), that the twin aims of the *Erie* rule are the discouragement of forum-shopping and avoidance of inequitable administration of the laws. In *Hanna,* although the choice of either the state or federal rule would have a marked effect on the outcome of the litigation, the difference between the rules had little to do with the choice of forum. It was held that when a federal rule applies to a case it will be controlling as long as it transgresses neither the terms of the Enabling Act nor the Constitution, and no attention need be paid to contrary state provisions.

The primary inquiry is the extent and the nature of the competing state and federal interests. As the Third Circuit points out on page four of its opinion, the only state interest for the application of a five-sixths majority rule is greater efficiency of its judicial administration by reducing the number of deadlocked juries. The petitioners are unable to point to a specific fundamental or constitutional right, of a citizen of the Commonwealth of Pennsylvania, to which the state interest is intimately tied. Nor are the petitioners able to point to any constitutional underpinnings which stand for the proposition that a citizen of Pennsylvania is entitled to the automatic application of the majority verdict rule. The issue posed to this Honorable Court in no way involves a problem of constitutional dimension. The orderly functioning of the federal court system is solely the concern of the federal judiciary, and, to a degree, the specific concern of each and every district court. F.R.C.P. 48 provides for a specific procedure by which a litigant could request utilization of the majority verdict rule. As the United States District Court for the Eastern District of Pennsylvania did not feel the need to promulgate an additional local rule, F.R.C.P. 48 was binding. Had the Eastern District felt the need for greater efficiency of its judicial administration it has the power to deal with its docket by way of formulating local rules of court. This is clearly no concern of the Commonwealth of Pennsylvania.

This analysis is supported by those cases relied upon by the petitioners, particularly by the case of *Colgrove v. Battin*, 413 U.S. 149 (1973) in which a local federal court rule provided that a jury trial for civil cases shall consist of six persons. This Court held that F.R.C.P. 48, dealing only with the parties' stipulations regarding jury size, does not prevent *local federal court rules* which provide for civil juries of reduced size. *E.g., Cooley v. Strickland Transportation Company*, 459 F. 2d 779 (5th Cir. 1972); *Palmer v. Ford Motor Company*, 498 F. 2d 952 (10th Cir. 1974). It is clear that the type of verdict to be rendered by a jury

in a federal district court is solely within the province of the federal judiciary.

Moreover, as the Third Circuit points out at pages 4-5 of its opinion the federal interest in unanimity, although perhaps not rising to constitutional dimension, is cloaked in a strong tradition. The petitioners admit by implication in their petition that the state interest in a majority verdict is insubstantial in a diversity action in federal court. As the Third Circuit points out at page 5 of its opinion "the federal interest need not be of Constitutional magnitude to outweigh an insubstantial state interest. . .if all other aspects of *Byrd* are met". Citations omitted. The adoption of inconsistent state procedural rules regarding the jury verdict would infringe on the characteristics of the federal system. More importantly, the adoption of the Pennsylvania state rule would infringe on congressional power, this Court's power and the lower federal courts' power to institute rules concerning practice and procedure within the federal system. As such, the adoption of the Pennsylvania state rule would infringe and begin to erode the functions and characteristics of the federal judiciary. *See Byrd,* 356 U.S. at 357.

The twin aims of *Erie* and its progeny are the avoidance of forum-shopping and the inequitable administration of laws. It is difficult to see how the utilization of the unanimous verdict rule would encourage a litigant to select one forum over another, a question to which the petitioners lend little guidance towards its resolution. In fact the "Question Presented" by the petitioners asks whether a federal district court must follow the law of the forum state, in a diversity case, relative to jury verdicts. If this is answered in the affirmative then each district court would be required to follow the law of the state in which it is sitting. This would easily contribute more to the encouragement of the selection of forums as the federal practice would differ from

state to state, depending on the size of the jury and the verdict rule. As any semblance of uniformity in the federal judiciary would be defeated, a litigant may be moved to select a forum based on the verdict law that a district court is required to utilize. Hence, the petitioners' contention would make a shambles of the uniformity and integrity of the practice and procedure of the federal judiciary.

In the case at bar, the selection of the forum and the inequitable administration of the laws are hardly a concern as either under thè Pennsylvania or the federal rule Outboard Marine Corporation would have received a favorable verdict as the jury decided *unanimously*. Had the state law applied, the respondents would still have prevailed. The application of F.R.C.P. 48 could hardly be said to discriminate against the petitioners inasmuch as their counsel never requested a stipulation for use of the majority verdict rule. This evidences the fact that the difference between the Pennsylvania law and the federal rule had nothing to do with the petitioners' choice of forum. Likewise, by the unanimous verdict, any possibility of an inequitable administration of the respective laws was avoided.

CONCLUSION

In summary, it is eminently clear that the United States District Court for the Eastern District of Pennsylvania, and the Third Circuit Court of Appeals were correct in their analysis and decision to rely on F.R.C.P. 48 and the unanimous verdict rule. The question at bar is not ripe for this Honorable Court to consider as the unanimous verdict rendered in favor of the respondents leaves no doubt that they would have succeeded under any verdict rule utilized. Moreover, it is the province of the federal judiciary to deal with the practice and procedure of their courts in a way which transgresses neither the Constitution, nor the Rule Enabling Act, 28 U.S.C. §2072 (1977). Federal Rule of Civil Procedure 48 transgresses neither the bounds of the Constitution nor the Rules Enabling Act.

For the foregoing analysis, the instant petition for writs of certiorari must be denied.

Respectfully submitted,

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Opposition

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81-612
No.

IN THE

Supreme Court of the United States

October Term, 1981

JOANNE BUBELLO, Administratrix of the Estate of ALAN J. BUBELLO, Deceased,

Petitioner,

v.

PAULADA TAYLOR and CHARLES E. TAYLOR and ELWYN SMITH, SR., d/b/a SMITH'S AUTO SERVICE and ELWYN SMITH, JR., d/b/a SMITH'S AUTO SERVICE,

Respondents.

BRIEF OF RESPONDENTS, ELWYN SMITH, SR., d/b/a SMITH'S AUTO SERVICE and ELWYN SMITH, JR., d/b/a SMITH'S AUTO SERVICE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the judgment of the Court of Appeals affirming the judgment of the district court refusing Petitioner's Motion for New Trial decide an important question of substantive state law in a manner in conflict with the applicable state law.

Argued in the negative.

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COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case is accepted.

ARGUMENT

There has been no violation of the rule of *Erie R. R. v. Tompkins*, 304 U. S. 64, in the courts below. Respondents do not argue against the general principle that the substantive law of Pennsylvania was determinative of the rights, duties and liabilities of the parties in this action but, rather, it is submitted that the Pennsylvania Statute (Title 42 Pa. C. S. A. [Purdon's 1980] § 5104 and § 5104(b)) allowing a less than unanimous verdict in a civil case is clearly a procedural rule and, thus, the federal law applies.

In federal courts, federal law, rather than state law, controls matters relating to verdicts. *Skidmore v. Baltimore & Ohio R. R. Co.*, 1948 (C. A. 2 NY) 167 F. 2d 54, *cert. den.* 335 U. S. 816, 69 S. Ct. 34.

For instance, in civil cases, the court may require a jury to return special verdicts or answers to interrogatories. The decisions have been consistent in such cases that the submission of special verdicts and of interrogatories with a general verdict is a matter of procedure and is governed by federal rather than state rules. *DeEugenio v. Allis-Chalmers Manufacturing Co.*, 1954 (C. A. 3 NJ) 210 F. 2d 409. When the federal rules on special verdicts and interrogatories are inconsistent with state law, the former governs. *Theurer v. Holland Furnace Co.*, (1941 C. A. 10 Utah) 124 F. 2d 494; *Cohen v. Traveler's Insurance Company*, 134 F. 2d 378.

The federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Spokane v. I. E. R. Co. v. Campbell*, 217 Fed. 218 (C. A. 9th), *aff'd* 241 U. S. 497, 36th SC 683. Furthermore, federal law controls the procedural aspects of jury selection in diversity cases. *Hoffman v. Sterling Drug, Inc.*, (1974) 374 F. Supp. 850. In *Byrd v. Blue Ridge Electric Cooperative*

Inc., 356 U. S. 525 the Supreme Court held that the determination of employees status for purposes of South Carolina's Workmen's Compensation Act, must be submitted to the jury in a federal diversity action even though South Carolina Courts would leave that issue to the trial judge.

As was indicated in the opinion of Judge Aldisert of the Court of Appeals in the case of *Masino v. Outboard Marine Corporation*, (1981 C. A. 3 PA, p. 7A-Appendix) there were three underlying premises for the *Byrd* decision:

> 1. The lack of a strong and explicit state policy justifying the removal of this discrete factual determination from the jury;
>
> 2. The federal interest in insuring access by litigants in federal courts to a jury; and
>
> 3. The continuing viability of the outcome determinitive analysis of *Guarantee Trust Company v. York*, 326 U. S. 99.

In the *Masino* case the Court of Appeals concluded that the Federal requirement of jury unanimity is the appropriate law in the present case.

The court stated "the concern with forum shopping in this case is minimal because the appellants brought suit in Federal Court even though they had notice that the Federal verdict requirement was very likely different from the one they advocated. This action, therefore, demonstrates that the rule chosen is not so determinative as to dictate choice of forum." The court also concluded that "the concern with preventing discrimination against residents is also minimal". They make their conclusion that "it is improbable that a party who has lost a verdict unanimously would have prevailed had he been required to persuade only 7 rather than 8 jurors to vote the other way.

The predominate effect of a majority verdict rule in comparison to unanimous verdict rule is to reduce the likelihood of deadlocked jurys". And, finally, the court concludes "the concern with state/federal relationship in this case is minimal because the state simply has no interest in managing trials conducted in federal courts".

This Honorable Court has often accepted the views of a court of appeals on state law as being those of an expert tribunal as to the laws of the state within its circuit. *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 707-8, 1949. As was noted by the Court in *Huddleston v. Dwyer*, 322 U. S. 232, 237, "ordinarily we accept and therefore do not review, save in exceptional cases the considered determination of questions of state law by the intermediate federal appellate courts".

Federal Rule of Civil Procedure No. 48 states:

> "The parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

This federal procedural rule clearly implies the unanimity requirement in federal actions. More than implied is the language found in *Johnson v. Louisiana*, 406 U. S. 356, 370 (1972), "unanimity . . . is mandated by history". In the case before the Court, the State of Pennsylvania has no interest in the trial management procedures followed in the federal courts. There is no demonstration to reflect any but an insubstantial state interest. Other than plaintiff's brief assertion that it is so, there is no evidence in the case whatsoever in support of the theory that the unanimous verdict requirement encourages forum shopping.

CONCLUSION

The rule of *Erie v. Tompkins, supra* was properly applied in this case. Matters relating to jury verdicts are procedural and not substantive ones and, thus, the federal law applies and not the state law.

The State's interest here as reflected in the Pennsylvania Statute is the management of its own trial list and reflects no interest in the management of federal trials.

There is no support in the record in this case, in the law or in common sense for the Petitioner's simple assertion that the unanimity requirement encourages forum shopping.

Further, in the instant case, the jury returned a unanimous verdict in favor of Respondents. Not one juror found in favor of Petitioner. How then would the application of the Pennsylvania Statute have changed the result? Clearly, if error were committed, it was harmless with no prejudice accruing to the Petitioner.

It is respectfully submitted that there exists no basis for the grant of a Writ of Certiorari in this matter.

Respectfully submitted,

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